

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 12, 2008 Session

IN THE MATTER OF K. L. D. R.

Appeal from the Chancery Court for Sumner County
No. 2007D-241 Tom E. Gray, Chancellor

No. M2008-00897-COA-R3-PT - Filed April 27, 2009

Mother appeals the termination of her parental rights on the grounds that the Indian Child Welfare Act was not complied with and that there was insufficient evidence to support the grounds supporting termination. We find the ICWA to be inapplicable under the exception recognized as the Existing Indian Family Doctrine. Alternatively, even if the ICWA is applicable, we find it was not violated. Finally, the record supports the termination, both as to grounds, including severe abuse and as to best interests. We affirm the termination of Mother's parental rights.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Affirmed

PATRICIA J. COTTRELL, P.J., M.S., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and ANDY D. BENNETT, JJ., joined.

W. Brian Stephens, Gallatin, Tennessee, for the Appellant, L. L. R.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Joshua Davis Baker, Assistant Attorney General, for the appellee, State of Tennessee, Department of Children's Services.

OPINION

L. L. R. ("Mother") appeals the termination of her parental rights to her daughter who was born in November of 2001 ("K.L.D.R."). According to Mother, the trial court failed to enforce the requirements of the Indian Child Welfare Act, 25 U.S.C. § 1903 *et seq.* ("ICWA"), which requires notice to K.L.D.R.'s tribe of the termination proceedings and a finding beyond a reasonable doubt that continued custody by the parent is likely to result in serious emotional or physical harm to K.L.D.R. In addition, Mother argues that the evidence does not support the various grounds for termination cited by the trial court and that termination is not in K.L.D.R.'s best interest.

I. PROCEEDINGS BELOW

A. Dependency And Neglect Proceedings

K.L.D.R. was placed in the custody of the Department of Children's Services ("Department") in July of 2005 when Mother was incarcerated leaving K.L.D.R. in her maternal grandparents' custody. Mother was in jail for 28 days related to an assault on her brother's girlfriend. Since the grandparents were found to be unfit, K.L.D.R. was adjudicated dependent and neglected by the juvenile court in September of 2005. Mother agreed to the dependency and neglect adjudication. K.L.D.R. has been in foster care since July of 2005.

A Permanency Plan was developed in August of 2005, a month after K.L.D.R. initially came into Department custody. It appears that Mother was still serving her 28 days in jail at this time. The Permanency Plan provided for supervised visits with Mother. The Plan also included several tasks for Mother which included:

1. find stable housing and allow the Department to inspect it by December 31, 2005;
2. find a legal means of support by August of 2006;
3. Avoid new criminal charges, attend court as needed, comply with court orders and meet with probation officers as needed;
4. Refrain from use of illegal drugs and use alcohol responsibly;
5. Submit to A&D evaluation, follow all recommendations, and sign of release of information so the Department can verify by August of 2006;
6. Submit to random drug tests; and
7. Attend counseling and anger management counseling with a release of information so the Department can verify by August of 2006.

The 2005 Permanency Plan had as its goal reunification with Mother by August of 2006. Mother signed the Permanency Plan with a reservation of rights to agree or disagree with the plan until "the adjudicatory and dispositional hearings have been held." No one questions the reasonableness of the plan or the notice to Mother of the consequences should she fail to comply with it.

After this Permanency Plan was in place, the Department was alerted to indications that K.L.D.R. had been sexually abused by Mother. As a consequence, in June of 2006, Mother was ordered by the juvenile court to have no contact with K.L.D.R. based on a finding of probable cause

that K.L.D.R. was severely abused as defined by law. The Department filed a petition seeking a judicial finding that K.L.D.R. had been severely abused, but that petition was not pursued. Instead, the Department decided to seek termination of Mother's parental rights.

B. Termination of Parental Rights Proceedings

On July 6, 2007, the Department initiated this action by filing a Petition to Terminate Parental Rights of Mother and K.L.D.R.'s father.¹ The grounds cited in the petition were as follows:

- (1) Abandonment by Failure to Establish a Suitable Home, Tenn. Code Ann. §§ 36-1-113(g)(1) and 36-1-102(a)(A)(ii);
- (2) Substantial Non-Compliance with Permanency Plan, Tenn. Code Ann. § 36-1-113(g)(2);
- (3) Persistence of Conditions, Tenn. Code Ann. § 36-1-113(g)(3); and
- (4) Severe Child Abuse, Tenn. Code Ann. §§ 36-1-113(g)(4) and 37-1-102(b)(21).

At the hearing in November of 2007, the trial court heard extensive testimony from those individuals who have had custody of K.L.D.R., including Mother, the former foster parents, the foster grandmother, and current foster mother. In addition, the court heard testimony from a variety of professionals about K.L.D.R. The clinical director of the Rape and Sexual Abuse Center, a licensed social worker, testified as K.L.D.R.'s therapist. The Team Leader for Children's Protective Services ("CPS") testified about her investigation into the allegations of sexual abuse. The court heard audio tapes of K.L.D.R.'s interview with the CPS investigator. The Department also presented an expert witness from Our Kids about child sexual abuse. There is no challenge to the admissibility of this evidence on appeal.

The trial court rendered a ruling from the bench on January 3, 2008, with the entry of the order of April 2, 2008 terminating Mother's parental rights.² The trial court found by clear and convincing evidence that Mother sexually abused K.L.D.R. Furthermore, the trial court also found by clear and convincing evidence that Mother knowingly exposed K.L.D.R. to the grandfather and uncle whom Mother knew were capable of child sexual abuse. In addition, the trial court also made the following finding of alternative grounds to terminate Mother's rights:

¹The trial court declined to terminate the parental rights of the putative father since there were some avenues of locating him that had not yet been fully pursued and some questions existed about K.L.D.R.'s parentage. Therefore, all matters as they pertained to the father were reserved.

²Termination of Mother's parental rights to four other children was affirmed by this Court more than a decade ago in *In re Stanfill*, 984 S.W.2d 925 (Tenn. Ct. App. 1998). Mother apparently did not raise her Indian heritage or the ICWA in that case.

That [Mother] has willfully abandoned the minor child, [K.L.D.R.], for more than four (4) consecutive months prior to the filing of this Petition; that for four (4) months following removal DCS made reasonable efforts to assist the parent in establishing a suitable home for K.L.D.R., but the parent made no reasonable effort to provide a suitable home and has demonstrated a lack of concern for K.L.D.R. to such a degree that it appears unlikely that she will be able to provide a suitable home at an early date; that she has been substantially non-compliant with the statements of responsibilities in the plan of care; that K.L.D.R. has been removed from the custody of the parent for more than six (6) months; that the conditions that led to K.L.D.R.'s removal still exist or other conditions exist which would in all probability subject K.L.D.R. to further neglect or abuse if returned home; that there is little likelihood that these conditions will be remedied at an early date so that K.L.D.R. could be returned to the [Mother] in the near future; that the continuation of the parent/child relationship greatly diminishes K.L.D.R.'s chances of early integration into a stable and permanent home; that [Mother] has committed severe child abuse as defined by T.C.A. § 37-1-102 against K.L.D.R. who is the subject of this petition; and that it is in the best interest of K.L.D.R. that all the parental rights of [Mother] to said child be forever terminated; and that the complete custody, control, and guardianship of said child be awarded to the State of Tennessee, Department of Children's Services, with the right to place said child for adoption and to consent to said adoption in *loco parentis*.

Mother appealed and claims that proper notice of the termination proceedings was not provided to Indian tribes as required by law, and the trial court failed to apply the beyond a reasonable doubt standard required under the ICWA. Mother also argued that the evidence was insufficient to support a finding on the four termination grounds or that termination was in K.L.D.R.'s best interest.

We will first address the issues surrounding ICWA and then examine Mother's challenges to the trial court's findings about each ground.

II. ICWA

The trial court found that the ICWA applied to this matter. Both parties argue the trial court made errors related to this finding. According to Mother, the trial court erred when it failed to correctly apply the ICWA in two ways. First, Mother argues that the Department failed to prove that it notified K.L.D.R.'s tribes of the termination proceedings as required by 25 U.S.C. § 1912(a). Second, the ICWA requires proof beyond a reasonable doubt that continued custody by the parent is likely to result in serious emotional or physical harm to K.L.D.R., 25 U.S.C. § 1912(f), rather than the clear and convincing standard used by trial court.

The Department, on the other hand, argues the trial court erred when it found the ICWA applicable since the “Existing Indian Family Doctrine” limits the applicability of the ICWA to situations where there is an existing Indian family or environment.

The first question is whether the ICWA is applicable to this case. The Department does not try to argue that K.L.D.R. is not an Indian child, agreeing that K.L.D.R. is “eligible for membership in an Indian tribe” under 25 U.S.C. § 1903(4) based on Mother’s having a degree of 7/64 Chickasaw/Choctaw Indian Blood. Instead, the Department argues that since K.L.D.R. was not in a family that practiced Native American culture, under the Existing Indian Family Doctrine the ICWA has no applicability.

Mother counters the applicability of the Existing Indian Family Doctrine in two ways.³ First, she argues that Tennessee should not recognize the Existing Indian Family Doctrine. Second, Mother argues that even if recognized in Tennessee, the Existing Indian Family Doctrine does not apply here since there is no proof in the record about whether K.L.D.R.’s family practiced Indian traditions.

A. Whether Existing Indian Family Doctrine is Recognized in Tennessee

The Existing Indian Family Doctrine rests on the premise that the ICWA was enacted to protect Native American families and culture and has no applicability where a child’s Native American ties are genetic only without any authentic ties related to culture or heritage. *See* Carol Schultz Vento, *Construction and Application of Indian Child Welfare Act* of 1978, 89 A.L.R. 5th 195. Although some courts have declined to recognize the Existing Indian Family Doctrine, it has also been met with acceptance. *Id.*

The only case that has considered whether the Existing Indian Family Doctrine is recognized in Tennessee is *In re Morgan*, No. 02A01-9608-CH-00206, 1997 WL 716880 (Tenn. Ct. App. Nov. 19, 1997). In that lengthy and well considered opinion, the Tennessee Court of Appeals concluded that the Existing Indian Family Doctrine should be adopted in Tennessee:

We are wary of an exception to a federal statute created by state courts. *See In re Adoption of T.N.F., supra*; and *Matter of Baby Boy Doe, supra*. However, in interpreting any statute, federal or state, we must be mindful of the purpose for which the statute was enacted. *Sharp v. Richardson*, 937 S.W.2d 846, 850 (Tenn.1996) (“The role of the Court in construing statutes is to ascertain and give effect to the legislative intent.”). We are persuaded that the ICWA was intended to remedy “the removal of Indian children from an existing Indian family unit and the resultant breakup of the Indian family.” *Baby Boy L.*, 643 P.2d at 175; *see also* 25 U.S.C. § 1901 (1983); *Holyfield*, 109 S.Ct. at 1599-1602. The ICWA, by its terms and the

³It is unclear from the record before us the extent to which the Existing Indian Family Doctrine was presented to the trial court. Mother, however, did not object to the Department’s reliance on this issue on appeal.

Congressional statement of its purpose, does not reflect an intent to apply to circumstances such as these, in which the putative father is a non-Indian, and the Indian mother years ago left the reservation. By all indications, even if Jeffrey had remained with Mother, he would not be raised in an Indian environment. Rather than preserving an existing Indian family, application of the ICWA under these circumstances would disrupt the adoptive family unit to place in an Indian environment a child who has had no contact with the reservation. We agree with courts finding that the ICWA was not meant to apply to such situations. *See In re S.C., supra; Rye v. Weasel, supra; Crews, supra; Bridget R., supra; Adoption of S.S., supra* (Heiple, J., concurring); *In re T.S., supra; In re C.E.H., supra; Hampton v. J.A.L., supra; Alexandria Y., supra.*

In re Morgan, 1997 WL 716880, at *16.

We discern no reason to reach a different conclusion. Consequently, we find that the Existing Indian Family Doctrine is recognized in Tennessee.

B. Whether The Existing Indian Family Doctrine Is Applicable To K.L.D.R.

Mother argues alternatively that even if the Existing Indian Family Doctrine is recognized in Tennessee, it has no applicability to this case due to the dearth of proof regarding whether K.L.D.R. was being raised by Mother in an existing Indian family or environment.

K.L.D.R.'S Indian lineage is derived from Mother having a degree of 7/64 Indian blood. It is clear from the record, however, that Mother did not reside on an Indian reservation. Furthermore, the record shows that the Indian tribe did not consider Mother an Indian citizen. In the confirmation from the Chickasaw Nation that they considered K.L.D.R. to be an Indian child under the ICWA, the tribe confirmed that Mother is "not recognized as a citizen." It does not appear that the putative father was of Native American descent. There is an extensive record in this case describing generations of sexual and drug abuse and a litany of Mother's past abusive relationships, including those involving her parents and brother. There is extensive evidence of Mother's addiction issues, social history, criminal history, psychological history, work history, and residential history. Nowhere in this extensive record, including Mother's testimony at the hearing, is there a wisp of evidence that K.L.D.R. was in a home or part of a family that recognized its Native American culture.

Based on this record, we find that the ICWA does not apply to these proceedings based on the Existing Indian Family Doctrine.

Alternatively, even if the ICWA were applicable, we find that the termination of Mother's rights would nevertheless be upheld. The record in this cause meets the evidentiary standard of the ICWA. Although the trial court employed a clear and convincing standard, we find that there is proof in the record that establishes beyond a reasonable doubt that continued custody by Mother is likely to result in serious emotional or physical damage to K.L.D.R. pursuant to 25 U.S.C. § 1912(f).

As for the notice required by 25 U.S.C. § 1912(a), there is no question that the Chickasaw and Choctaw tribes received notice of the dependency and neglect proceedings regarding K.L.D.R. Each tribe responded to the Department that K.L.D.R. is an Indian child under the ICWA. It is not clear, however, whether the tribes received specific notice of the termination proceedings. In order to address this possibility, the trial court had its termination order sent to both tribes so that the tribes involved would have the opportunity to ask the trial court to modify or reconsider its order.⁴ The record reflects no objection or other response from the interested tribes.

III. TERMINATION OF PARENTAL RIGHTS

A. Standard For Termination of Parental Rights

In Tennessee, a court may terminate a person's parental rights only if the party seeking termination proves by clear and convincing evidence (1) the existence of at least one statutory ground and (2) that termination of the parent's rights is in the best interest of the child. Tenn Code Ann. § 36-1-113(c); *In re F.R.R.*, III, 193 S.W.3d 528, 530 (Tenn. 2006). Only one ground need be proved to support the termination of parental rights, so long as it is proved by clear and convincing evidence. In *the Matter of D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003).

Once any single ground for termination has been proved, the court must then turn to the question of best interest. The burden rests on the petitioner to prove by clear and convincing evidence that termination of the rights of the parents is in the best interest of the child or children involved, keeping in mind that termination has the effect of “irrevocably severing the relationship between the parent and the child.” *White v. Moody*, 171 S.W.3d 187, 193-194 (Tenn. Ct. App. 2004).

In order to be clear and convincing, evidence must eliminate any serious or substantial doubt about the correctness of the conclusions to be drawn from the evidence. *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002) (citing *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n.3 (Tenn. 1992)). Such evidence should produce in the fact-finder’s mind a firm belief or conviction as to the truth of the allegations sought to be established. *In re M.L.P.*, 228 S.W.3d 139, 143 (Tenn. Ct. App. 2007); *In re Georgianna H.*, 205 S.W.3d 508, 516 (Tenn. Ct. App. 2006). In contrast to the preponderance of the evidence standard, clear and convincing evidence should demonstrate that the truth of the facts asserted is “highly probable” as opposed to merely “more probable” than not. *In re M.A.R.*, 183 S.W.3d 652, 660 (Tenn. Ct. App. 2005) The burden is on the party seeking to terminate parental rights to present clear and convincing evidence that grounds exist and that termination would serve the best interests of the children. *In re Valentine*, 79 S.W.3d at 546.

⁴Further, while Mother did not send the tribes a copy of her notice of appeal, the Department sent the tribes a notice that the transcript from the proceedings was filed for review pending appeal. Counsel for the Department also sent the tribes a Notice of Appearance filed with the appellate clerk’s office. Finally, counsel for the Department sent the tribes a copy of its appellate brief.

B. Severe Child Abuse

The trial court found that Mother had sexually molested K.L.D.R. as alleged in the Department's petition. Furthermore, the trial court also found Mother knowingly exposed K.L.D.R. to the maternal grandfather and uncle when Mother was well aware that both of these men were capable of child sexual abuse.

Termination of parental rights on the ground of severe abuse is authorized by Tenn. Code Ann. § 36-1-113(g)(4) which refers to the statutory definition of severe abuse found in Tenn. Code Ann. § 37-1-102(b)(21). Under that definition, "severe child abuse" is:

(A) The knowing exposure of a child to or the knowing failure to protect a child from abuse or neglect that is likely to cause great bodily harm or death and the knowing use of force on a child that is likely to cause great bodily harm or death;

(B) Specific brutality, abuse or neglect towards a child which in the opinion of qualified experts has caused or will reasonably be expected to produce, severe psychosis, severe neurotic disorder, severe depression, severe developmental delay or retardation, or severe impairment of the child's ability to function adequately in the child's environment, and the knowing failure to protect a child from such conduct; or

(C) The commission of any act towards the child prohibited by §§ 39-13-502 - 39-13-504, 39-13-522, 39-15-302, and 39-17-1005 or the knowing failure to protect the child from the commission of any such act towards the child; or

(D) Knowingly allowing a child to be present within a structure where the act of creating methamphetamine, as that substance is defined in § 39-17-408(d)(2), is occurring.

The trial court was presented with extensive testimony which it expressly found to be credible and compelling that K.L.D.R. was sexually molested by Mother. Witnesses testified that K.L.D.R. disclosed and continued to maintain that Mother sexually molested her. The Court heard testimony that K.L.D.R. was afraid of her Mother and did not want to see her. The foster parents and foster grandmother testified about sexualized behavior exhibited by K.L.D.R. The child's therapist concluded that K.L.D.R. had been sexually abused based on K.L.D.R.'s behaviors that were recognized indicators of abuse. Mother did not argue that the extensive evidence of Mother's abuse relied upon by the trial court was somehow inadmissible. Instead, Mother argued the evidence did not support the trial court's conclusions. It is unnecessary to reiterate the particulars of proof

supporting the trial court's conclusion except to note that it is basically uncontradicted and compelling.

With regard to Mother exposing K.L.D.R. to known predators, Mother testified that her father, K.L.D.R.'s maternal grandfather, had attempted to sexually molest Mother as a child. It was also proved that Mother allowed K.L.D.R. to be exposed to the maternal grandfather. Mother admitted leaving K.L.D.R. with the maternal grandparents, knowing that it was not a good idea, but Mother explained that she trusted her mother at the time. Mother testified that it was possible that the maternal grandparents sexually abused K.L.D.R.⁵ Consequently, by Mother's admission, she knowingly exposed her daughter to a man she knew was capable of molesting her.

Whether one uses the standard beyond a reasonable doubt that Mother argues is applicable under the ICWA or the clear and convincing standard under Tennessee law, we conclude that K.L.D.R. was severely abused by Mother within the meaning of Tenn. Code Ann. § 37-41-102(b)(21), on two independent grounds; (1) Mother's sexual abuse, and (2) Mother's knowing exposure of K.L.D.R. to someone known to Mother to be a child sexual predator.

Since the Mother subjected K.L.D.R. to severe child abuse, the Department was under no obligation to use reasonable efforts to reunify the Mother with K.L.D.R. *In re M.O.*, 173 S.W.3d 13, 21 (Tenn. Ct. App. 2005); Tenn. Code Ann. § 37-1-166(g)(4)(A).

C. Substantial Non-Compliance With Permanency Plan

Tennessee Code Annotated § 36-1-113(g)(2) authorizes termination of parental rights for failure to comply with a parenting plan as follows:

(2) There has been substantial noncompliance by the parent or guardian with the statement of responsibilities in a permanency plan or a plan of care pursuant to the provisions of title 37, chapter 2, part 4;

The standards for reviewing termination of parental rights based on Tenn. Code Ann. § 36-1-113(g)(2) have been discussed by the Tennessee Supreme Court in *In re Valentine*, 79 S.W.3d 539. Prior to terminating a parent's rights on this ground, the trial court must find that the requirements of the permanency plan that the parent allegedly did not satisfy are "reasonable and are related to remedying the conditions which necessitate foster care placement." *Id.* at 547 (quoting Tenn. Code Ann. § 37-2-403(a)(2)(C)). If the trial court fails to make this finding, this court must review the trial court's decision *de novo* without a presumption of correctness. *In re Valentine*, 79 S.W.3d at 547.

⁵There are indications in the record that K.L.D.R. was sexually abused by Mother's brother and both of K.L.D.R.'s maternal grandparents. The trial court made no finding on the grandparent issue.

In order for noncompliance to justify the termination of parental rights, it must be “substantial.” In other words, mere technical noncompliance alone is not sufficient to justify the termination of parental rights. *Id.* at 548. Noncompliance with requirements in a permanency plan that are neither reasonable nor related to remedying the conditions that led to the removal of the child from the parent’s custody is not relevant for purposes of Tenn. Code Ann. § 36-1-113(g)(2). *In re Valentine*, 79 S.W.3d at 548-49. Additionally, the parent’s degree of noncompliance with a reasonable and related requirement must be assessed.

It should be noted that Mother’s obligations under the Parenting Plan were formulated prior to discovery of the severe abuse perpetrated by Mother. We find, however, even if the severe abuse had not occurred, the termination would be upheld on this ground alone.

The Permanency Plan dated August 16, 2005 required Mother to obtain stable housing, a legal means of support, resolution of legal issues, abstain from illegal activity, abstain from alcohol abuse/use of illegal drugs, and demonstrate emotional health. The Department alleged in the Petition that Mother has not complied with the reasonable requirements.

On appeal Mother argues that the trial court erred and that the evidence did not support a finding that Mother failed to substantially comply with the Permanency Plan. According to Mother, the ICWA requires proof beyond a reasonable doubt as opposed to the standard under Tennessee law requiring clear and convincing evidence. We find there is evidence in the record to prove this ground under either standard.

Mother argues she substantially complied with the essential elements of the Permanency Plan. As to housing, Mother never argues that she found stable housing, only that she looked. At the time of the hearing, she was living in a motel. As for a legal job, Mother admits that while she does not have a problem finding a job, she has problems keeping one. The record shows that Mother has had a succession of jobs. As for avoiding criminal charges, Mother admits being arrested at least once for public intoxication since K.L.D.R. came into custody. Obviously, Mother also had problems with abuse of alcohol evidenced by her arrest. Mother maintains she performed other tasks that required releases so the Department could verify Mother’s participation. The Department case manager testified, however, that while she requested records verifying Mother’s compliance, she did not receive them. This is not to say that Mother did nothing at all, but it was far from substantial compliance. Prior to the discovery of abuse, the Department exercised reasonable efforts to help Mother meet these goals, which Mother does not seriously dispute. The Department case manager testified it was sometimes difficult to locate Mother due to her frequent change of residences. Consequently, the trial court did not err in terminating Mother’s parental rights for failure to comply with the Parenting Plan

D. Reasonable Effort To Place K.L.D.R. With Relatives

Mother argues on appeal that the Department failed to attempt to place K.L.D.R. with a fit and willing relative pursuant to Tenn. Code Ann. § 37-2-403(d).⁶ First, this issue concerns custody and should have been raised in the dependency and neglect proceeding. It is not a basis to defeat a petition to terminate parental rights. Second, the uncle and maternal grandparents have been implicated in sexual abuse. Mother has failed to identify a suitable relative placement. The identity of the paternal family remains questionable. Consequently, there is no basis for reversal of the termination in this objection.

E. Persistence of Conditions

Mother also asserts that the trial court erred by finding grounds for terminating her parental rights for persistence of conditions under Tenn. Code Ann. § 36-1-113(g)(3). That ground applies where a child has been removed from the home of the parent or guardian by a court order for a period of six months or more, and

(A) The conditions that led to the child's removal or other conditions that in all reasonable probability would cause the child to be subjected to further abuse or neglect and that, therefore, prevent the child's safe return to the care of the parent(s) or guardian(s), still persist;

(B) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent(s) or guardian(s) in the near future; and

(C) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home;

Tenn. Code Ann. § 36-1-113(g)(3).

⁶Tenn. Code Ann. § 37-2-403(d) is part of the statutory scheme governing permanency plans for children in foster care and provides as follows:

(d) Whenever a child is removed from such child's home and placed in the department's custody, the department shall seek to place the child with a fit and willing relative if such placement provides for the safety and is in the best interest of the child. Notwithstanding any provision of this section or any other law to the contrary, whenever return of a child to such child's parent is determined not to be in the best interest of the child, then such relative with whom the child has been placed shall be given priority for permanent placement or adoption of the child prior to pursuing adoptive placement of such child with a non-relative.

The Department alleged in its petition that conditions that prevent K.L.D.R.'s return to Mother were failure to maintain a stable home or stable legal employment and sexual abuse. The Department alleged in its petition that based on the severe abuse suffered by K.L.D.R. that the Department is excused from demonstrating reasonable efforts to reunite Mother and K.L.D.R.

For the foregoing reasons, we agree with the trial court that the persistence of these conditions will likely continue whether the standard of proof is by clear and convincing or beyond a reasonable doubt. Consequently, termination on this ground is likewise affirmed.

F. Best Interests

Once any single ground for termination has been proved, the court must then turn to the question of best interest. The issue for us is whether the Department sustained its burden of proving by clear and convincing evidence that termination of Mother's parental rights to K.L.D.R. was in her best interest. *In re Valentine*, 79 S.W.3d at 546; *White v. Moody*, 171 S.W.3d 187, 193-194 (Tenn. Ct. App.2004). Ascertaining a child's best interest in a termination of parental rights case is a fact-intensive inquiry. *In re Audrey S & Victoria L.*, 182 S.W.3d 838, 878 (Tenn. Ct. App.2005).

The General Assembly has set out a non-exhaustive list of factors for courts to consider when making a best interest determination:

In determining whether termination of parental or guardianship rights is in the best interest of the child pursuant to this part, the court shall consider, but is not limited to, the following:

- (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
- (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
- (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
- (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
- (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;

(6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;

(7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;

(8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or

(9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Tenn. Code Ann. § 36-1-113(i).

The nine non-exclusive factors were designed to help the court connect the past behavior of the parents and the current circumstances of both parents and children with future possibilities. Although the statute is a useful analytical tool, this court has noted that:

Ascertaining a child's best interests in cases of this sort does not call for a rote examination of each of Tenn. Code Ann. § 36-1-113(i)'s nine factors and then a determination of whether the sum of the factors tips in favor of or against the parent. The relevancy and weight to be given each factor depends on the unique facts of each case. Thus, depending upon the circumstances of a particular child and a particular parent, the consideration of one factor may very well dictate the outcome of the analysis.

White v. Moody, 171 S.W.3d 187, 194 (Tenn. Ct. App. 2004).

Based on the record before us and the finding of severe abuse, whether the beyond a reasonable doubt standard of the ICWA applies as argued by Mother or whether the clear and convincing standard under Tennessee law applies, termination of Mother's parental rights is in K.L.D.R.'s best interest. To use the language of the ICWA, there is proof beyond a reasonable doubt that continued custody by Mother is likely to result in serious emotional or physical harm to K.L.D.R.

IV. CONCLUSION

The termination of Mother's parental rights is affirmed. Costs of appeal are taxed to appellant, Mother, for which execution may issue if necessary.

PATRICIA J. COTTRELL, P.J., M.S.